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IN THE

SUPREME COURT OF THE UNITED STATES

No.

WILLIAM BOSTIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, William N. Bostic, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the United States District Court for the District of South Carolina.*

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*References: "App. ––, *infra*, p. ––," are contained in the appendix to this Petition; "Rec. ––," are those contained in the record below.

JUDGMENTS BELOW

The District Court's opinion is reported at 336 F. Supp. 1312 and reproduced at Appendix B, *infra* p. 1b. It was affirmed *per curiam* without opinion by the Court of Appeals (Appendix A, *infra*, p. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered October 2, 1972. (Appendix A, *infra*, p. 1a). By order of the Chief Justice, dated December 21, 1972, the time for filing a petition for a writ of certiorari was extended to March 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the District Court precluded from imposing civil penalties and injunctive action for violation of the terms of the Federal Trade Commission's consent cease and desist order whose parameters embraced none of the products or services sold or distributed by the petitioner?

STATUTES INVOLVED

TITLE 15, U.S. Code,

Section 45(a)(1): Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

Section 45(l): Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation,

which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 56: Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

STATEMENT

This case involves a civil penalty complaint filed December 21, 1970 by the United States against William N. Bostic, in the United States District Court for the District of South Carolina for alleged violations of a final consent order of the Federal Trade Commission ("Commission").

Prior Proceedings

On August 4, 1964 the Commission issued its agency complaint charging the petitioner with violating §5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §45(a)(1), in the interstate advertising, offering for sale, sale and distribution to the public or aluminum carports,

aluminum patio covers and aluminum siding". (Rec. 29).[1]

On about January 7, 1965, the petitioner and the Commission terminated this litigation by agreeing to a cease and desist order which forbad certain unfair acts and practices by petitioner in the performance of services while remodeling homes and selling various listed aluminum products. (App. B, *infra*, p. 1b).

The terms of the consent order provided: (Appendix C, *infra*, p. 1c; Appendix B, *infra*, pp. 1b-2b).

"It is ordered that the respondents Aluminum Industries, Inc., a corporation, and its officers, and William N. Bostic, individually and as an officer of said corporation, and doing business as Southern Patio Company, Southern Aluminum Sales, and under any other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, *or any other products* in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are

[1] Record below at p. 29: "The Federal Trade Commission on August 4, 1964 issued its complaint charging the above-named respondents with violation of Section 5 of the Federal Trade Commission Act in the interstate advertising, offering for sale, sale and distribution to the public of aluminum carports, aluminum patio covers and aluminum siding". The foregoing is contained in the Initial Decision of the Hearing Examiner in Docket No. 8634 of the Commission's proceedings, issued November 24, 1964.

made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered by sale.

3. Representing directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services." (Emphasis added).

The order became final on March 8, 1965.[2] (App. B, *infra*, p. 1b).

All agree there were no violations of the consent order respecting the sale or distribution of aluminum home improvement products or services recited in the order.

Petitioner's New Business

In February 1967, about two years following the finality of the cease and desist order, petitioner formed a corporation, Family Pools, Inc., for the sale and installation of swimming pools, (App. B, *infra*, p. 16b). The business of Family Pools, Inc., was unrelated to the consent order.[3]

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[2]The stipulation of facts basic to the consent order recited, among other things:

"In the conduct of their business, at all times mentioned herein, respondents (petitioner here) have in the past been in substantial competition, in commerce, with corporations, firms and individuals *in the sale of home improvement products and services* of the same general kind and nature as those sold by respondents". (Rec. 818). (Emphasis added). [Identified as plaintiff's Exhibit 38 at page 818, para. 9 of the Record.]

[3]"Q. "It was a consent cease and desist order, wasn't it?" A. "Yes." Q. "There were no swimming pools in contemplation were, there?" A. " * * * he was not engaged in the business of selling swimming pools at that time." Q. " * * * the cease and desist order

Petitioner, through Family Pools, Inc., sold swimming pools to customers responding to petitioner's advertisements inserted in various news media. (App. B, *infra*, p. 8b; 10b-14b).

Neither an adjudicative nor a consent order existed or now exists between petitioner and the Commission respecting the petitioner's sales and services incident to the swimming pool business.

Nevetheless, on about June 15, 1970 the Commission, without first according petitioner an adjudicatory hearing required by the Administrative Procedure Act [60 Stat. 239, 5 U.S.C. 554(a)], certified to the Attorney General that petitioner had violated the March 8, 1965 cease and desist order in committing certain acts and practices respecting his swimming pool business. (App. B, *infra*, p. 3b).

Petitioner unsuccessfully urged to the trial court that petitioner's acts and practices in swimming pool sales and services were not covered by the March 8, 1965 consent order and further that the District Court's *de novo* hearing was a usurpation of the Commission's administrative function. (App. B, *infra*, pp. 3b, 7b, Fdg. 2).

The District Court, in the absence of agency findings and order respecting petitioner's swimming pool business, made *de novo* findings as to petitioner's sales plans in pertinent part as follows: (App. B, *infra*, pp. 7b-10b).

> "a. An advertisement was inserted in a newspaper or magazine offering to sell a completely installed swimming pool for a price of under $1,000. In some

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to which he consented, (the) swimming pool was not one of the products?" A. "No." (Rec. 197, lines 16 to 24). [Cross-examination of FTC investigator, witness for the government]

instances the offer included a "free portable TV", or a ten year warranty, or both; and in some instances the advertisement contained reference to a much higher "regular price". The advertisements contained a post office box number, as well as a telephone number, for prospective purchasers to contact.

b. When the prospect responded (usually by telephone) an appointment was set up and one of defendant's agents and salesmen would go to the prospect's home, stating he was there because of the prospect's response to the advertisement.

c. If the prospect confirmed his interest in the pool, the agent wrote out a contract for the pool described in the advertisement (known as ADV pool), at the price stated in the ad. This contract would be signed by the prospect and the salesman and the prospect would be advised that it was a binding contract from which neither party could withdraw.

d. After obtaining the execution of the contract for the ADV pool and advising the prospect that neither party could withdraw from the contract, the agent, after a brief casual social conversation, would begin to call attention to the various disadvantages of the ADV pool, such as: cost of maintenance on a wooden pool, necessity of periodic painting of the pool, problem with wood rotting on pool, difficulty in emptying all water from the pool. All of this was intended to and did make the prospect quite apprehensive about the desirability of the ADV pool which he had just contracted to buy.

e. The agent would then advise the prospect that the company had a larger pool, which was a new product and not yet in general production or availability for sale. This pool was known as the

PRO pool by the defendant and his salesmen, but usually called the Dolphin or some aquatic name in talking with the prospect. The agent would produce a model of the pool from his automobile, which model was complete with walkways, deck patio, landscaping, shrubbery, diving board, ladders and other accessories to improve its appearance. He would call attention to the indestructibility of the pool, the safety features, the superior quality of the lining and the fact that it was "maintenance free" and required no painting.

f. When the prospect raised the question of the price of the PRO pool he was advised that it was normally priced from five to eight thousand dollars, but because the prospect was the first person in his area to whom the pool had been shown, the price would be lowered. At this point a bargaining process usually began and the price was lowered from time to time and usually culminated in a telephone call from the salesmen to his "boss" for permission to sell the pool at a very low price. In the bargaining process the free television, poolside furniture, shrubbery and other extras were removed to reduce the price. The price finally agreed upon varied from a low of two thousand dollars to as high as thirty-five hundred dollars. As an additional inducement the prospect was told that he would receive fifty dollars for each person who saw his pool, and then purchased one from the company, if he would allow his pool to be used as a neighborhood demonstrator and would allow a small sign to be erected near the pool.

g. If the prospect purchased the PRO pool, the contract for the ADV pool was mutually cancelled. If the prospect did not purchase the PRO pool, the ADV pool was never delivered."

Over objection, the only testimony offered at the trial related to petitioner's practices in the sale and distribution of swimming pools. (App. B, *infra*, p. 3b).[4] No evidence of petitioner's selling activities was offered respecting his sales of aluminum products or services recited in the March 8, 1965 prohibitive consent order.

The District Court concluded the petitioner violated the prohibitions in the terms of the consent order of March 8, 1965. Civil penalties totaling $80,000 were imposed, together with an injunction as demanded by the government. (App. B, *infra*, pp. 19b-20b).

REASONS FOR GRANTING THE WRIT

This case lays open the current practice of the Federal Trade Commission in §5(a)(1) cases [15 U.S.C. §45(a)(1)] to issue blanket cease and desist orders in the broad words of the statute, which perpetually enjoin the petitioner to obey a vague statutory provision on pain of contempt or penalty proceedings, without providing any guideposts for compliance beyond the perplexing test of the statute itself. As exemplified by this case such enigmatic orders not only compel the petitioner and others who advertise and sell products and services to compete at their peril, but inevitably shift from the Commission to the courts in enforcement proceedings the agency's duty to apprise such persons how to conduct their business in compliance with the law.

The language of the cease and desist order of March 8, 1965 prohibited the petitioner from using bait and switch selling tactics respecting aluminum home repair products

[4] "At all times mentioned in the complaint, the defendant was engaged in the offering for sale, sale and distribution of swimming pools * * * (App. B, *infra*, p. 7b, para. 3).

or products of a like kind and nature incident to petitioner's business.

The courts below reasoned that words of general description–"or any other products"–in an order otherwise limited to aluminum type home improvement products, warranted unrestricted elasticity and scope to embrace any and all products and services which petitioner may now or in the future sell or distribute,[5] in order to seize jurisdiction in a civil penalty proceeding. The error of the lower courts' approach is confirmed by statements of this Court that–

> "The severity of possible penalties prescribed * * * for violations of orders which have become final underlies the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367-8.

Although the findings of the District Court were supported by the *de novo* trial evidence in the civil penalty proceedings, the petitioner was nevertheless denied procedural due process for failure of the Commission to first conduct an adjudication hearing under Section 5(b) of the FTCA, 15 U.S.C. 45(b), in accordance with the Administrative Procedure Act[6] respecting

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[5] "[T]he defendant contended that the sale of swimming pools was not covered by the terms of the order. However, it is obvious from the wording of the order that it is intended to cover *all products* sold by the defendant, at the time of the execution of the order, and *in the future*, and covers *any product* in commerce." (Emphasis ours) (App. B, *infra*, p. 3b).

[6] 15 U.S.C. §554(a). *Adjudications:* This section applies * * * in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except * * * (not material here) * * *.

the Commission's investigation of petitioner's swimming pool sales and services.

It was incumbent upon the Commission to give petitioner an opportunity to submit "facts, arguments, (and) offers of settlement * * * " [Administrative Procedure Act, 80 Stat. 384, 5 U.S.C. §554(c)] respecting his swimming pool business in response to a commission complaint prior to entry of a prohibitive order and reference to the Attorney General for civil penalty action. The District Court, therefore, usurped the administrative function of the Commission in these proceedings by conducting a *de novo* hearing on petitioner's alleged unfair trade practices while engaging in his swimming pool business.

This Court repeatedly ruled that the function of the Court is to determine whether the Commission's final cease and desist order has been violated, not to make findings of fact which would support a valid FTC order. On this score it was held in *FTC v. Morton Salt Co.*, 334 U.S. 37,54.

"One of the reasons for entrusting enforcement of this Act primarily to the Commission, a body of experts, was to authorize it to hear evidence as to given differential practices and to make findings concerning possible injury to competition. Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired, if, without compelling reasons not here present, the Commission cease and desist orders did no more than shift to the courts in subsequent

> contempt proceedings for their violations the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final, * * * is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order."

So long as the decision in this case stands, any value judgment as to the efficacy of a penalty will turn upon the whim of the Commission or the Attorney General rather than upon the scope and specificity of the prohibitive order. The decision below ignores all analogous baselines. Where criminal penalties are exacted constitutional limitations demand specifics, not generalities. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 91. No different rule should apply where the punishment, though denominated "civil penalities", can reach the astronomical proportions possible under §5 of the FTCA.

2. There is a paucity of reported cases concerning the enforcement of civil penalty provisions under the Federal Trade Commission Act for violations of Commission cease and desist orders.

The severity of possible penalities prescribed by 15 U.S.C. §45(*l*), *supra*, pp. 2-3, for violations of orders underlie the necessity for requiring the Commission to fashion orders, which are sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

Remedial action is necessary to expose the snares and traps lying in the uncertain language of the Commission's coercive consent orders whose scope seems to enlarge and expand at the Commission's whim.

Unless this Court intervenes, the Commission will continue to fit its victims to the Procrustean bed of imprecise orders and will not alter its expansive order-writing technique exemplified in the order of March 8, 1965, *supra*, pp. 4-5. At the very least, the order's words—"or any other products"—suggests that the problem of formulating a precise and specific order, clear as to scope and reasonable as to coverage, has not been solved up to this time. The reasonableness of coverage, and the clarity and specificity of what is prohibited are lacking in the March 8, 1965 consent order. Ambiguity in penalty matters should be resolved against the government and favorably to the citizen.

Due process concepts bar enlargement of the limited consent order of March 8, 1965 into an "all purpose" order covering any and all of petitioner's actions and products now and in the future.

So long as the Commission continues to write "all purpose" orders and feels free to certify them to the Attorney General indiscriminately for civil penalty action under 15 U.S.C. 56, individuals, like petitioner, under prohibitive orders will be unable with safety to sell products of any kind at any time without fear of severe penalties.

Unless this Court limits the Commission's and the Attorney General's power in civil penalty proceedings by application of the doctrine of *ejusdem generis* in their reading of general terms contained in prohibitive orders, the jurisdictional lines between the Commission's adjudicative hearing authority and the District Court's power to entertain civil penalty suits will evaporate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. LYMAN
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Washington, D.C. 20036
Attorney for the Petitioner

March 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1116

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM M. BOSTIC,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
Robert F. Chapman, District Judge

(Argued September 12, 1972 Decided October 2, 1972)

Before WINTER and BUTZNER, Circuit Judges,
and Murray, District Judge

Joseph J. Lyman (W. Ray Berry and Fulmer, Berry, and Alford on brief) for Appellant, and Robert E. Duncan, Attorney, Office of General Counsel, Federal Trade Commission, (Ronald D. Dietrich, General Counsel, Harold D. Rhynedance, Jr., Assistant General Counsel, Federal Trade Commission, Thomas E. Kauper, Assistant Attorney General, Howard E. Shapiro, George Edelstein, Attorneys, Department of Justice, John K. Grisso, United States Attorney, Charles W. Gambrell, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

In this appeal from the judgment of the district court, imposing civil penalities pursuant to the Federal Trade Commission Act for violations of a final cease-and-desist order of the Federal Trade Commission and enjoining further violations by defendant, we find no error. We affirm for the reasons sufficiently stated by the district court. United States v. Bostic, 336 F.S. 1312 (D. S.C. 1972).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America,)
Plaintiff,)
v.) Civil Action No. 70-1135
William N. Bostic,) ORDER
Defendant.)

On January 7, 1965, the Federal Trade Commission issued its Cease and Desist Order in Docket No. 8634, which Order was based on a consent agreement by the defendant, William N. Bostic, and directed that he and certain corporations controlled by him cease engaging in certain unfair and deceptive acts and practices in violation of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)). The Order became final by operation of law on March 8, 1965, and was in effect at all times mentioned in the complaint and referred to by witnesses in this proceeding.

The January 7, 1965, Order provided as follows:

"It is ordered that the respondents Aluminum Industries, Inc., a corporation, and its officers, and William N. Bostic, individually and as an officer of said corporation, and doing business as Southern Patio Company, Southern Aluminum Sales, and

under any other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, or any other products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, of disparaging, any products or services which are advertised or offered for sale.

3. Representing directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services."

The complaint contained twenty separate counts of alleged violations of the Order. Defendant's answer contained a general denial and also alleged that the complaint did not state facts sufficient upon which relief could be granted. At various times during the proceedings the defendant contended that the Order was too vague, general and all inclusive to be enforceable and that it was in violation of the constitutional guarantee of due process because of this overbreadth and vagueness. Defendant also contended that the Federal Trade Commission had not complied with its own rules and regulations in certifying the facts to the Attorney General and in failing to advise the defendants that he was not in compliance with the Order and discussed such non-compliance with him and given defendant an opportunity to submit his views respecting the alleged violations.

The Court finds that these allegations of defendant are without merit. The letter of Caspar W. Weinberger, Chairman of the Federal Trade Commission, addressed to the Attorney General of the United States under date of June 15, 1970, certifies the facts of the violations by the defendant and requests the institution of appropriate proceedings for recovery of civil penalities and for a permanent injunction. The testimony of George Zervas and Joel Thwaites, together with the correspondence between the Federal Trade Commission and the defendant and his attorney certainly indicate that the defendant was advised that he was not in compliance with the order and was given ample opportunity to determine the specifics of the allegations of non-compliance and to bring himself within the provisions of the Order, if he had really desired to do so.

At one point the defendant contended that the sale of swimming pools was not covered by the terms of the Order. However, it is obvious from the wording of the Order that it is intended to cover all products sold by the defendant at the time of the execution of such Order, and in the future, and covers any product in commerce. The actual thrust of the Order is directed against a deceitful and unlawful sales technique and therefore covers any product the defendant or his representatives might sell using the "bait and switch" sales approach.

The Government carried its burden of proof overwhelmingly on each count and is entitled to recover penalties thereon. The defendant has deliberately flouted the provisions of the Cease and Desist Order. His callous disregard of the Order, which approaches contempt, and his efforts to disguise his interstate activities, by setting up a corporation in North Carolina with his sister as a "front", all lead this Court to the conclusion that an injunction should also be issued against the defendant.

The defendant relies upon the Jencks Act 18 U.S.C. 3500 to support his motion to strike the depositions of Donald Lee Allen, Mr. and Mrs. Garland Duncan, Roy L. Good, Edward P. Greene and Gwyn Allen Miller. When these depositions were taken in the State of North Carolina in early July 1971, defense counsel requested copies of statements of these individuals, and the request was denied by counsel for the plaintiff on the grounds of privilege and work product of attorneys for the plaintiff. On September 7 depositions were taken of Mrs. Lois Reno Guy and Sergeant and Mrs. Musselwhite and defense counsel demand copies of statements given by these witnesses. On July 31, 1971, defendant filed a motion under Rule 37(a) of the Federal Rules of Civil Procedure, for an Order compelling the plaintiff to answer certain interrogatories, which demanded copies of all signed and unsigned statements in the possession of the plaintiff. This motion was granted by the Court after a hearing on September 14, 1971. The statements were thereafter furnished to defense counsel on September 22, 1971. The defendant first raised the question of denial of due process under the Jencks Act after the trial had begun on November 22, 1971.

The Jencks Act was legislated to limit the effect of the case of *Jencks vs. United States*, 353 U.S. 657, which involved the right of an accused to have for purposes of impeachment a document prepared by a Government witness which formed the basis of the witness' testimony. The principle of the Jencks case has been applied to administrative hearings, and justice requires no less. Section (b) of the Statute reads:

"(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to

produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use."

The object of this provision is to enable defense counsel to use prior statements of a witness for impeachment purposes. This is inherent in the language and context of the above provision.

In the present action the defense counsel made no effort on cross examination of the witnesses to question them regarding their signed statements and never attempted to attack the veracity of the witness. The defendant relies upon the case of *Harvey Aluminum v. National Labor Relations Board*, 335 F.2d 749 (9th C.A. 1964). The Court feels that the cases are not analogous. In *Harvey* the N.L.R.B. charged the company with engaging in an unfair labor practice by employing undercover agents (employees of a detective firm) to maintain surveillance of union activities. The company admitted surveillance but insisted that its object was to prevent pilferage. There was a conflict in testimony of employees of the detective agency as to the nature of their duties and the Court was faced with the question of fact as to which witnesses to believe. In the *Harvey* case the prior statements were sought for the purpose of attacking the credibility of the witnesses. Subpoenas duces tecum, addressed to the Secretary of Labor and the Attorney General were issued by later revoked; and petitioners then sought to have the Board ask the Secretary of Labor and the Attorney General to make the

statements available, under 29 U.S.C.A. 161(6). This request was denied. The present proceeding is unlike Harvey Aluminum, since there is no conflict as to the central issue, there is no conflict in the testimony of the various Government witnesses, and the Government did produce the copies of statements, at the direction of the Court, and two months before the trial of the case. The present defendant was aware as early as July 7, 1971, that the Government objected to furnishing copies of the witnesses' statements, but did not invoke the Jencks Act until the trial. The defendant also had sixty days after receiving copies of the witnesses' statements to re-examine any witness to determine credibility, but he did nothing. Two witnesses were deposed after the statements were delivered to the defendant, but defense counsel were not present at these depositions. Three witnesses, who had been deposed, were present and gave testimony at the trial, but the defense counsel made no effort to contradict or impeach them with the statements.

No effort was made by the defendant to call as a witness any of the salesmen or agents to testify as to what sales pitch was used or to attempt to contradict the testimony of the various consumers. The defendant stipulated that the depositions of persons not present at the trial would be admissible, knowing full well that he had not cross-examined these witnesses as to prior statements, and knowing that he would not take further depositions based on information he had received from the prior statements. He cannot complain that he has been deprived of due process in light of his own refusal to take any protective steps when he had ample opportunity to do so prior to the trial date.

After considering all the evidence the Court makes the following:

FINDINGS OF FACT

1. Defendant William N. Bostic is a resident of the State of South Carolina and is charged with violating the provisions of a Cease and Desist Order (entered into and accepted by the defendant), issued by the Federal Trade Commission on January 7, 1965, which directed him to refrain from certain sales practices, more particularly set forth above.

2. Under the language of this Order defendant was prohibited from engaging in any of the practices enumerated, in connection with the offering for sale, sale or distribution of any product in commerce, and the effect of the Order was not limited to products being sold at the time it was issued, but extended to any and all products which defendant might thereafter sell, offer to sell or distribute in commerce.

3. At all times mentioned in the complaint, the defendant was engaged in the offering for sale, sale and distribution of swimming pools in commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (18 U.S.C. Section 44).

4. The advertisements, identified in Exhibits D through Q to the complaint, each appeared repeatedly, on various dates, in the publications enumerated in Counts 1 through 8 of the complaint and constituted a sales plan, scheme or device of the type contemplated and prohibited by paragraph 1 of the Federal Trade Commission's Order.

5. This sales plan, commonly referred to as a "bait and switch" operation was used in essentially the following manner;

a. An advertisement was inserted in a newspaper or magazine offering to sell a completely installed swimming pool for a price of under $1,000. In some instances the offer included a "free portable TV", or a ten year warranty, or both; and in some instances the advertisement contained reference to a much higher "regular price". The advertisements contained a post office box number, as well as a telephone number, for propsective purchasers to contact.

b. When the prospect responded (usually by telephone) an appointment was set up and one of defendant's agents and salesmen would go to the prospect's home, stating he was there because of the prospect's response to the advertisement.

c. If the prospect confirmed his interest in the pool, the agent wrote out a contract for the pool described in the advertisement (known as ADV pool), at the price stated in the ad. This contract would be signed by the prospect and the salesman and the prospect would be advised that it was a binding contract from which neither party could withdraw.

d. After obtaining the execution of the contract for the ADV pool and advising the prospect that neither party could withdraw from the contract, the agent, after a brief casual social conversation, would begin to call attention to the various disadvantages of the ADV pool, such as: cost of maintenance on a wooden pool, necessity of periodic painting of the pool problem with wood rotting on pool, difficulty in emptying all water from the pool. All of this was intended to and did make the prospect quite apprehensive about the desirability of the ADV pool which he had just contracted to buy.

e. The agent would then advise the prospect that the company had a larger pool, which was a new product and not yet in general production or availability for sale. This pool was known as the PRO pool by the defendant and his salesmen, but usually called the Dolphin or some aquatic name in talking with the prospect. The agent would produce a model of the pool from his automobile, which model was complete with walkways, deck patio, landscaping, shrubbery, diving board, ladders and other accessories to improve its appearance. He would call attention to the indestructibility of the pool, the safety features, the superior quality of the lining and the fact that it was "maintenance free" and required no painting.

f. When the prospect raised the question of the price of the PRO pool he was advised that it was normally priced from five to eight thousand dollars, but because the prospect was the first person in his area to whom the pool had been shown, the price would be lowered. At this point a bargaining process usually began and the price was lowered from time to time and usually culminated in a telephone call from the salesman to his "boss" for permission to sell the pool at a very low price. In the bargaining process the free television, poolside furniture, shrubbery and other extras were removed to reduce the price. The price finally agreed upon varied from a low of two thousand dollars to as high as thirty-five hundred dollars. As an additional inducement the prospect was told that he would receive fifty dollars for each person who saw his pool, and then purchased one from the company, if he would allow his pool to be used as a neighborhood demonstrator and would allow a small sign to be erected near the pool.

g. If the prospect purchased the PRO pool, the contract for the ADV pool was mutually cancelled. If the prospect did not purchase the PRO pool, the ADV pool was never delivered."

6. All the purchasers who appeared as witnesses, in person or by deposition, stated that the initial contact with defendant's agent was the direct result of having read one of the advertisements referred to in Finding No. 4, and which defendant through his attorney admitted having been inserted by him in the publications outlined in Counts 1 through 8 of the complaint.

7. About April 1967, Sergeant and Mrs. Leon W. Ohls saw the advertisement in *TV Guide*. The Ohls called the telephone number given in the advertisement and were later contacted by the defendant's agent at their home in Augusta, Georgia. The sales technique was basically as described in Finding No. 5. At one time during the bargaining over the price, a telephone call was made to the defendant and Ohls discussed the matter with him by telephone. Thereafter the PRO pool was purchased, rather than the pool as advertised. Sometime later the defendant Bostic actually called by the home of the Ohls family in Augusta, Georgia, to correct some problem in the operation of the pool. The witness Ohls identified the defendant Bostic in the courtroom as having come by his house on that occasion.

8. Sometime in the Spring of 1967 Mr. and Mrs. Donald L. Allen of Kingsport, Tennessee, answered an ad in *TV Guide*, which showed a swimming pool priced at around $800. They called the telephone number indicated and Raymond W. Fowler, an agent for the defendant, called at their home and went through the sales technique outlined in Finding No. 5, whereby the Allens signed a contract for the ADV pool, but after

Fowler made certain observations and disparaging comments about the pool, they purchased the PRO pool for approximately $2,500.

9. In April 1967, Mr. Roy L. Good saw an advertisement by Family Pools, Inc., which showed a swimming pool priced at $895 and called to arrange for one of defendant's agents to come to his home in Hickory, North Carolina. The agent, whose name was Fowler, showed Mr. Good and his wife the ADV pool and after they had signed the contract for the pool he brought out the model for the more expensive PRO pool and generally followed the "bait and switch" approach. The Goods voided the contract on the ADV pool and purchased a PRO pool for approximately $3,300.

10. Some time prior to April 21, 1967, Sergeant and Mrs. Smitty Musselwhite of Fayetteville, North Carolina, saw an advertisement in *TV Guide*, which showed a swimming pool advertised at approximately $800. They called the local number and one of defendant's agents, by the name of Hayden, called at their home about April 21, 1967. The "bait and switch" sales approach was used and the Musselwhites signed a contract for the ADV pool, after which they were shown the model of the PRO pool and were persuaded to void the ADV contract and sign the contract for a PRO pool.

11. In May 1967, Mrs. Lois Guy saw an advertisement in either the Fayetteville, North Carolina Observer of TV Guide which showed a swimming pool priced at around $800. She called the telephone number given and one of the defendant's agents called at her home in Fayetteville, North Carolina. The "bait and switch" sales scheme was used and Mrs. Guy signed a contract for the ADV pool after which she was advised of the cost of maintenance,

problems with wood rot and other shortcomings of the pool. She was thereafter persuaded to purchase a PRO pool and void the contract for the ADV pool.

12. In May 1967, Mr. and Mrs. Billy Gene Rushing answered an advertisement in the Winston Salem, North Carolina *Journal-Sentinal*. Thereafter one of defendant's agents called at their home in Winston Salem, North Carolina, at which time Mr. Rushing signed a contract for an ADV pool to be delivered in two weeks and made a deposit of $200. Thereafter the defendant's agent began to disparage the pool and used the "bait and switch" tactic, but Mr. Rushing would not agree to purchase the PRO pool or to cancel the contract on the ADV pool. His ADV pool has never been delivered and his deposit has not been returned.

13. In about June 1967, Mr. James W. Cudworth saw an advertisement in the Greensboro, North Carolina *Record* showing a swimming pool priced at $639. After answering the advertisement defendant's agent called on Mr. Cudworth at his home and an ADV pool contract was signed for $639.

Thereafter the "bait and switch" scheme was initiated, but Mr. Cudworth insisted on the ADV pool and made a deposit thereon. In spite of repeated attempts to secure delivery of the pool, including a visit to Columbia, South Carolina, Mr. Cudworth never received delivery of his pool and finally cancelled his order. His deposit was returned after he enlisted the aid of the Columbia Better Business Bureau.

14. Sometime in May 1967 Mr. and Mrs. Edward P. Greene saw an advertisement in *TV Guide* showing a swimming pool priced at approximately $800 to $900.

An agent called on them in response to their answer to the ad, and on June 7, 1967, they signed a contract for an ADV pool. Thereafter the agent brought a model of the more elaborate and expensive PRO swimming pool into the home, advising them that it was not yet on the market. The agent pointed out the poor qualities of the ADV pool and generally followed the "bait and switch" scheme outlined in Finding No. 5, resulting in a contract for the PRO pool being signed for $2,495.

15. Sometime prior to July 10, 1967, Mr. Gwyn Allen Miller saw an advertisement for a square swimming pool, and responded to the ad by calling a telephone number in Columbia, South Carolina. Thereafter an agent of defendant called on Mr. Miller at his home in Connelly Springs, North Carolina, and a contract for the ADV pool was signed at a price ofapproximately $900. The agent then brought in a model of the more elaborate and expensive PRO pool and the usual "bait and switch" scheme was used, resulting in cancellation of the contract for the ADV pool and execution of the contract for the PRO pool.

16. Sometime prior to July 28, 1967, Mr. and Mrs. Frank Powers saw an advertisement in the Greensboro, North Carolina *Record* showing a swimming pool priced at approximately $639. In response to a telephone call one of defendant's agents, Mr. Floyd Sigmon, called at the Powers home in Greensboro, North Carolina. The "bait and switch" tactic was used and the Powers signed a contract for the PRO pool at a price of $2,995.

17. Approximately four months prior to July 1967, Mr. and Mrs. Garland Duncan answered an advertisement in *TV Guide* showing a swimming pool priced at about $895. On or about July 14, defendant's agent, Mr. Charles Rush, called the Duncan home in Elizabethtown,

Tennessee, introduced himself as from Family Pools of Columbia, South Carolina. After the Duncans had signed a contract for the ADV pool the model of the more expensive and elaborate PRO pool was brought into the home. The "bait and switch" sales approach was used and the Duncans cancelled the first contract and signed a contract for the PRO pool at a price of $2,500. Said contract was made out on the form headed "Family Pools, Inc., Post Office Box 5412, Columbia, South Carolina".

18. Sometime prior to August 3, 1967, Mrs. Lois Williams and her daughter, Miss Judy Williams, saw an advertisement in either the Anderson *Independent* or in the *Daily Mail*, both newspapers published in Anderson, South Carolina. Upon answering this advertisement defendant's agent Mr. Raymond Fowler called at the Williams home in Taccoa, Goergia. The usual "bait and switch" game was used and the Williams signed the contract for the ADV pool, thereafter changing to the PRO pool. The contract form used carried the name of Family Pools, Inc. with an address as Post Office Box 5412, Columbia, South Carolina.

19. Sometime in February 1967, Miss Jenny Waters, Manager of Services Unlimited, Winston Salem, North Carolina, (a telephone answering, mobile communications and patrons service organization) received a telephone call from an individual identifying himself as Mr. E.K. Webster of Columbia, South Carolina. Mr. Webster told Miss Waters he wanted to use the facilities of her answering service to handle telephone calls resulting in advertisements inserted by Family Pools, Inc. in *TV Guide*. He instructed Miss Waters to mail any leads or names of prospective customers to him at Family Pools, Inc., P.O. Box 435, Columbia, South Carolina. The name

"Webster" was proved to be a code name used by the defendant to identify prospective customers answering advertisements.

20. Sometime prior to March 3, 1967, Mr. Jim Hinshaw, who operates a telephone answering service in Greensboro, Burlington, and Winston Salem, North Carolina, was contacted by an individual, who identified himself as either Mr. E.K. Webster or Mr. Bostic, and made arrangements to have telephone calls resulting from advertisements by Family Pools, Inc. handled by Mr. Hinshaw's organization. Leads or prospective customers' names were to be forwarded to Post Office Box 435, Columbia, South Carolina. According to Mr. Hinshaw the advertising referred to generated a great many calls and records of these calls were forwarded as instructed. The service was furnished from March 3 to September 15, 1967.

21. Mrs. Mary Swallows Koucky was employed by defendant as office manager in the office of Family Pools, Inc., Columbia, South Carolina, for a period of approximately eight months from the summer of 1967 until March 1968. Part of her duties involved the placing of swimming pool contracts with various finance companies. If the purchaser's credit rating was not sufficient to place the contract with an independent finance company, it was placed with the Carolina Fund, Columbia, South Carolina, which was operated by the defendant.

Mrs. Koucky testified to sales of pools to purchasers in North Carolina, Georgia and Tennessee. All pool contracts were entered on a record book as they were received, showing the date and the name of the purchaser. A ledger card was made out for each purchaser,

and an individual file made up for each sale, arranged alphabetically in a file cabinet.

When Mr. Joel S. Thwaites, Federal Trade Commission Attorney from Atlanta, Georgia, came to the office of Family Pools, Inc. in 1967 to interview the defendant as to his failure to file compliance reports required on the Commission's Order in Docket 8634, the defendant directed that the office door be locked, and while Mr. Thwaites waited outside, defendant directed that the files on all out of state sales be removed from the file cabinets and hidden, and the names of all out of state purchasers of swimming pools be erased from the record book.

Mrs. Koucky testified that defendant explained to her the "bait and switch" sales method used in the sale of the pools. Mrs. Koucky also stated that during her employment by the defendant, he had in his possession a check book for Family Pools, Inc. of Rockingham, North Carolina, filled with blank checks signed by Mrs. Rushing.

22. About February 1967, defendant William N. Bostic asked his sister, Martha Rushing, and her husband, H. Bryce Rushing of Hoffman, North Carolina, to set up Family Pools, Inc. of Rockingham, North Carolina, as a corporation chartered under the laws of the State of North Carolina, for the purpose of selling swimming pools in North Carolina. Defendant designated Mr. Rushing as President and Mrs. Rush as Secretary-Treasurer. Mrs. Rushing opened a bank account in the Carolina Bank for the North Carolina corporation, with funds supplied by the defendant, and as directed by the defendant forwarded all mail received by the corporation, as well as all bank statements to Family Pools, Inc. to Columbia, South Carolina. Mr. Rushing performed no duties in connection with his position as President. No organizational meeting was held, no by-laws were pre-

pared, and no minutes of directors or stockholders meetings were available, since such meetings were not held. There were no salesmen employed by the Rushings and they maintained no record or copies of contracts. Mr. and Mrs. Rushing did not attempt to sell swimming pools.

The only checks on the bank account of Family Pools, Inc. of Rockingham, North Carolina, which Mrs. Rushing made up were those covering the incorporation fee and her salary. She sent the book of blank checks, signed by her, to the defendant in Columbia, South Carolina, and she identified the handwriting on several checks as that of the defendant's wife, Phyllis Bostic. Mrs. Rushing also disavowed the writing of certain letters, which were prepared by the defendant and brought to her for execution only. When Mr. and Mrs. Rushing had an interview with Mr. Joel Thwaites and realized that swimming pools were being sold in other states, and certain questions arose regarding the activities of the corporation, they cancelled the charter of Family Pools, Inc. of Rockingham, North Carolina, and dissolved the corporation on advice of their attorney.

23. The testimony of all the witnesses clearly shows that the defendant continued to follow the same "bait and switch" scheme of selling and pattern of conduct which the Federal Trade Commission had prohibited by its Order of January 7, 1965, and by doing so repeatedly violated said Order.

From the foregoing facts, the Court makes the following

CONCLUSIONS OF LAW

1. The Federal Trade Commission's Order in Docket 8634, issued January 7, 1965, prohibiting the defendant from using "bait and switch" methods in offering for sale, selling or distributing products in commerce, became effective and enforceable on March 8, 1965, and has been in full force and effect at all times since.

2. The language of said Order is clear and unambiguous, and covers not only those products then being offered for sale, sold or distributed in commerce, but "any other products, which defendant might offer for sale, sell or distribute in commerce, in the future." The Order is not too broad or general. See *Niresk Industries, Inc. vs. Federal Trade Commission* 278 F. 2d 333, 342-343, 7th Cir. 1960, rehearing denied June 8, 1960, in which the Court stated:

> "Finally, petitioners contend that the Order of the Commission is too broad and should, therefore, be set aside or modified. The findings of unfair and deceptive practices against the petitioners were confined to their advertising and sale of the cooker-fryer, while the Order of the Commission enjoins the use of like advertising by petitioners in conjunction with the sale of the fryer or any other product. Petitioners contend that the Order must be restricted to their advertisement and sale of the cooker-fryer alone.
>
> We do not agree with that contention. The Commission has a large discretion in its choice of a remedy which it deems necessary to cope with the unlawful practices found, and courts may interfere with the Commission's choice only if the remedy selected bears no reasonable relationship to such

unlawful practices. *Federal Trade Commission vs. National Lead Co.* 354 U.S. 419, 429; *Federal Trade Commission vs. Ruberoid Co.* 343 U.S. 470, 473. Commission orders are not designed to punish for past transgressions, but are designed as a means to prevent illegal practices in the future. *Federal Trade Commission vs Ruberoid, supra* page 473. To the end that the Commission may achieve that purpose, its orders may prohibit not only the further use of the precise practice found to have existed in the past, but also, future use of related and similar practices. Petitioners marketed a large number of products in commerce. They stand adjudged guilty of the use of illegal practices in the advertisement and sale of one product. We think it is entirely reasonable for the Commission to frame its Order broadly enough to prohibit petitioners' use of identical legal practices for any purpose, or in conjunction with the sale of any and all products."

3. The evidence is clear that defendant deliberately attempted to evade the prohibitions of the Commission's Order by arranging to set up a corporation in North Carolina, which was controlled and directed by him, in spite of his efforts to conceal such ownership and control.

4. On the twenty occasions mentioned in the Findings of Fact, defendant William N. Bostic has flagrantly and repeatedly violated Paragraphs 1, 2 and 3 of Commission's Order of January 7, 1965.

5. The blatant nature of defendant's disregard for the Order of the Federal Trade Commission warrants the imposition of a sizable penalty and fine of Four Thousand and No/100 ($4,000.00) Dollars for each violation is hereby imposed making a total fine against

the defendant of Eighty Thousand and no/100 ($80,000.00) Dollars.

6. The course of action pursued by the defendant in intentionally violating the provisions of the Commission's Order, and his evident purpose to continue to engage in the same "bait and switch" sales method, has convinced this Court that future violations of the Order can be prevented only by issuance of an injunction under the equitable powers vested in the United States Courts. See *United States vs. Vitasafe Corporation* 234 F. Supp. 710 (S.D.N.Y. 1964), affirmed per curiam 352 F. 2d 62 and *Hecht Co. vs Bowles* 321 U.S. 321.

IT IS, THEREFORE, ORDERED that the plaintiff, United States of America, have judgment against the defendant, William N. Bostic, in the amount of Eighty Thousand and No/100 ($80,000.00) Dollars.

IT IS FURTHER ORDERED that defendant, William N. Bostic, his representatives, agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any goods in interstate commerce, is hereby permanently enjoined from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or misrepresentations are made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, or disparaging any product or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

IT IS FURTHER ORDERED that the defendant is continually enjoined and required to serve a copy of this Decree on all present and future sales representatives, agents and employees of any corporate or other business enterprise owned, operated or controlled, or which may be in the future owned, operated, controlled or required by him and operated by him at his direction, whether by proxy or by instructions given to members of his immediate family.

/s/ Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

TRUE COPY
TEST:
MILLER C. FOSTER, JR., CLERK
By: /s/
Gail B. Elkin
Deputy Clerk

December 21, 1971
Florence, South Carolina

[Caption Omitted in Printing]

ORDER

[Filed Jan. 7, 1972]

Under date of December 21, 1971, an Order was issued in this case, and it has come to the Court's attention that there is a typographical error and the omission of a word on next to the last line of the Order. The word "required" appearing at the beginning of next to the last line should be "acquired" and the word "or" has been omitted after the word "him" and before the word "at".

Under the provisions of Rule 60(a) Federal Rules of Civil Procedure the Court desires to correct said errors and

IT IS, THEREFORE, ORDERED that the last paragraph of said Order shall be corrected to read as follows:

"IT IS FURTHER ORDERED that the defendant is continually enjoined and required to serve a copy of this Decree on all present and future sales representatives, agents and employees of any corporate or other business enterprise owned, operated or controlled, or which may be in the future owned, operated, controlled or acquired by him and operated by him or at his direction, whether by proxy or by instructions given to members of his immediate family."

AND IT IS SO ORDERED.

/s/ Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT COURT

TRUE COPY
TEST:
MILLER C. FOSTER,
/s/ Laurel K. Barden
By: Deputy Clerk

January 6, 1972
Florence, South Carolina

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
ALUMINUM INDUSTRIES, INC., a corporation, and	)	
WILLIAM N. BOSTIC, individually and as an officer of said corporation, and as a sole proprietor doing business as SOUTHERN PATIO COMPANY, and as SOUTHERN ALUMINUM SALES.	)	DOCKET NO. 8634

AGREEMENT CONTAINING STIPULATION OF FACTS AND AGREED ORDER

* * * * *

ORDER

IT IS ORDERED that respondents Aluminum Industries, Inc., a corporation, and its officers, and William N. Bostic, individually and as an officer of said corporation, and doing business as Southern Patio Company, Southern Aluminum Sales, or under any other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

/s/
Eldon P. Schrup,
Hearing Examiner.

November 24, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1192

WILLIAM BOSTIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises the question whether liability for violating a Federal Trade Commission order which prohibits the use of "bait and switch" tactics in the sale of certain aluminum products "or any other products" may be based on the use of those tactics in the sale of swimming pools.

1. By complaint issued in 1964 (67 F.T.C. 1), the Federal Trade Commission initiated an administrative proceeding alleging that petitioner and certain firms he controlled had used "bait and switch" tactics in the sale of aluminum products, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).[1]

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[1] Section 5(a)(1) of the Act provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

The agency proceedings were terminated by the entry of a consent cease-and-desist order (Pet. App. 1c-2c) which prohibits petitioner

> * * * in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, *or any other products in commerce* * * * from:
>
> 1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.
>
> 2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.
>
> 3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services * * *.[Emphasis added.]

Subsequent investigations led the Commission to believe that petitioner was using the prohibited "bait and switch" tactics in the sale of swimming pools in violation of the order. Accordingly, pursuant to 15 U.S.C. 56, it certified the facts constituting the violations to the Attorney General, who in turn instituted

this suit under Section 5(*l*) of the Act[2] for civil penalties and injunctive relief.[3]

After a non-jury trial, the district court concluded that petitioner had violated the "clear and unambiguous" terms of the order on twenty separate occasions in connection with the sale of swimming pools. 336 F. Supp. 1312, 1320-1321; Pet. App. 1b, 18b-19b. It ruled that petitioner "has flagrantly and repeatedly violated" the order and that the "blatant nature of [petitioner's] disregard" for the order "warrants the imposition of a sizable penalty" of $4,000 for each violation—a total penalty of $80,000, and the issuance of an injunction against further violations. 336 F. Supp. at 1321; Pet. App. 19b-20b.

The court of appeals affirmed the judgment of the district court *per curiam* "for the reasons sufficiently stated by the district court" (Pet. App. 1a-2a).

2. The decision below is correct and the petition raises no question warranting further review.

---

[2] Section 5(*l*) (15 U.S.C. 45(*l*)) provides, in pertinent part:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *

[3] Violations of a Commission cease-and-desist order subject the violator to penalties in proceedings under Section 5(*l*). Contrary to petitioner's contention (Pet. 10-11), there is no requirement that "adjudication hearings" before the Commission must precede the institution of a civil penalty suit for violating a Commission order.

Petitioner asserts (Pet. 9) that the consent cease-and-desist order "in the broad words of the statute, * * * perpetually enjoin[s] the petitioner to obey a vague statutory provision on pain of contempt or penalty proceedings, without providing any guideposts for compliance beyond the perplexing test of the statute itself."[4] The order, however, prohibits the use of misleading statements in sales and advertising and petitioner does not deny that he engaged in misleading "bait and switch" tactics after the order became final.

To the extent that petitioner claims that the order is too broad or too vague because it prohibits "bait and switch" tactics in the sale of "any other products," that claim is equally untenable. Petitioner agreed to the entry of the order; it is no defense to a proceeding to enforce the order that petitioner agreed to too much. Had petitioner insisted upon limiting the consent order to those products he was then selling, the Commission might well have proceeded with the litigation. Had it then found that petitioner had employed "bait and switch" tactics, it could properly have prohibited him from employing such tactics in the future with respect to any product.[5] *Federal Trade Commission* v. *Colgate Palmolive Co.*, 380 U.S. 374, 394-395; *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 333, 342-

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[4] There is no provision for contempt proceedings for violating a Federal Trade Commission order which has not been enforced by a court of appeals.

[5] The agreement entered into by the parties to the Commission proceedings which formed the basis for the entry of the consent order in this case contained a stipulation of facts which the hearing examiner found "amply and unequivocally support the allegations and charge of the [Commission's] complaint * * *" (67 F.T.C. 4, 8).

343 (C.A. 7), certiorari denied, 364 U.S. 883. If such a prohibition is appropriate in a litigated Commission order, it is no less appropriate in a consent order. Having agreed to it, petitioner was bound to comply with it. He cannot collaterally challenge it now.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JAMES T. HALVERSON,
Acting General Counsel,
HAROLD D. RHYNEDANCE, JR.
Assistant General Counsel,
ROBERT E. DUNCAN,
Attorney,
Federal Trade Commission.

APRIL 1973.